Supreme Court, U.S.
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NO. 88-1711

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1988

DONALD PRUESSMAN,

Petitioner,

v.

GORDON LEWIS, M.D.; DR. JOHN T. MacDONALD FOUNDATION, d/b/a DOCTORS HOSPITAL; JOSEPH F. McALOON, STUART L. SMITH; L.C. SMALL; CITY OF CORAL GABLES, KEN BUSH; R. POOR; D. MOORE; RICHARD J. NAUE, JR.; GLENN FALK; COMMUNITY HEALTH OF SOUTH DADE, INC.; JOHN H. TRENHOLM; JEROME BELOFF, M.D.; ANGEL DIAZ M.D.; MICHAEL ROBINSON,

Respondents.

GORDON LEWIS, M.D.'S RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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26 pp

QUESTION PRESENTED

Whether the Eleventh Circuit Court of Appeals, in affirming the dismissal of this action by the United States District Court for the Southern District of Florida, decided a federal question so as to conflict with applicable decisions of this Court, or rendered a decision in conflict with a decision of another federal court, or decided an important issue not previously settled by this Court?

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OTHER AUTHORITIES:

42 U.S.C. § 1983 . . . . . .1, 3, 8, 10, 12, 15-19

§ 394.463, Fla. Stat. 1

STATEMENT OF THE CASE AND FACTS

Petitioner's statement ignores certain facts which are significant to an understanding of the issues presented. As such, Respondent, GORDON LEWIS, presents the following statement of the case and facts.

On May 28, 1986, Plaintiff, DONALD PRUESSMAN, filed two pro se Complaints against the same defendants. One action was filed in state court (the Eleventh Judicial Circuit in and for Dade County) and the second was filed in federal court (the Southern District of Florida). Both Complaints arose out of an involuntary commitment procedure conducted by Defendants pursuant to section 394.463, Florida Statutes, Florida's Mental Health "Baker" Act. As amended, both complaints sought recovery under theories of false imprisonment, assault and battery, conspiracy and violations of 42 U.S.C. § 1983. The

federal court action also sought declaratory relief. The state court action was vigorously pursued, while Plaintiff failed to even effectuate service of process in the federal court proceeding.

On October 2, 1987, the district court sua sponte entered an Order to Show Cause why Plaintiff's case should not be dismissed for lack of prosecution. (R1-3).[1] Plaintiff responded and the Court quashed its order to show cause on November 24, 1987. (R2-19). Plaintiff was ordered to effectuate service upon all parties within forty-five (45) days of the Order. (R2-19). Finally, on January 20, 1988, LEWIS was served with the federal Amended Complaint (R1-8), nearly nine months after he was served with the state court Complaint.

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[1]All Record references in this Response are to the record before the Eleventh Circuit.

LEWIS filed a Motion to Dismiss on the basis that the same action was pending and actively being pursued in state court. On January 28, 1988, the district court entered an Order dismissing Plaintiff's state court claims since they "present[ed] matters purely of state law" and the court found that it would "be inappropriate and inefficient to litigate these matters in federal court." (R1-13-1).

On February 8, 1988, the district court entered an Order dismissing the § 1983 claim and prayer for declaratory relief finding that there was not a good faith basis for the simultaneous institution and continued maintenance of complaints by Plaintiff in two different courts. (R1-16-1). Plaintiff's Motion to Vacate was denied (R2-18) and Plaintiff timely appealed. (R2-21).

On December 19, 1988, the United States Court of Appeals for the Eleventh

Circuit affirmed the district court's dismissal of the action finding that an evaluation of the factors set forth in Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976) and Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1 (1983), established that dismissal was proper. Rehearing was denied on January 23, 1989. On April 21, 1989, Plaintiff filed the instant Petition for a Writ of Certiorari in the Supreme Court of the United States.

ARGUMENT

I.

THERE IS NO BASIS FOR THE EXERCISE OF THIS COURT'S JURISDICTION.

It is axiomatic that this Court will limit its adjudicatory resources to those cases involving the most fundamental constitutional and statutory questions and to preserve uniformity of decisions among the intermediate courts. Petitioner herein argues that certiorari should be granted because the Eleventh Circuit's decision conflicts with Supreme Court and other federal court decisions and raises an important issue not previously settled by this Court. This response will demonstrate that there is no basis upon which this Court should review the Eleventh Circuit's decision.

A. The Eleventh Circuit's Opinion is Consistent with Applicable Supreme Court Decisions.

The issue before the Eleventh Circuit Court of Appeals was whether the district court properly dismissed Plaintiff's federal action in deference to the identical action pending in state court. The appropriate test by which to determine if a federal court should dismiss an action based on a concurrent state action is set forth in Colorado River Water Conservation District v. United States, 424 U.S. 800, 96 S. Ct. 1236, 47 L. Ed. 2d 483 (1976) and Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983). In Colorado River, this Court recognized that there are principles of "wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation,"424 U.S. at 817 (quoting Kerotest

Manufacturing Co. v. C-O-Two Fire Equipment Co., 342 U.S. 180, 183, 72 S. Ct. 219, 221, 96 L. Ed. 200, 203 (1952)), which govern in situations involving the exercise of concurrent jurisdiction.

The factors to be considered in making this determination include the following: (1) whether one of the courts had assumed jurisdiction over the property; (2) the inconvenience of the federal forum; (3) the potential for piecemeal litigation; (4) the order in which the forums obtained jurisdiction; (5) whether federal or state law will be applied; and (6) the adequacy of each forum to protect the party's rights. Colorado River, 424 U.S. at 818; Cone Memorial, 460 U.S. at 23-27.

Moreover, when called upon to review a district court's decision, the issue is whether the district court abused its discretion in dismissing the action. Will v.

Calvert Fire Ins. Co., 437 U.S. 655, 98 S. Ct. 2552, 57 L. Ed. 2d 504 (1978); Mission Insurance Co. v. Puritan Fashion Corp., 706 F.2d 599 (5th Cir. 1983).

Petitioner contends that the Eleventh Circuit's decision, which affirmed the district court's dismissal, does not comport with Cone Memorial and Colorado River. Of primary concern to Petitioner is the pendency of his § 1983 action. However, an analysis of the facts of this case, even taking into account the existence of a § 1983 action, reveals that the Eleventh Circuit's ruling is consistent with the Supreme Court's pronouncements.

The first two factors are neutral. This case does not involve a situation where a court has assumed jurisdiction over property. Thus, this factor is not relevant. As to the second factor, the inconvenience of the federal forum, LEWIS agrees

with Petitioner that either forum is convenient to all parties.

The third factor, the potential for piecemeal litigation overwhelmingly weighs in favor of dismissal of the federal action. The avoidance of piecemeal litigation was the message conveyed by the Supreme Court's decision in Brillhart v. Excess Insurance Co. of America, 316 U.S. 491, 62 S. Ct. 1173, 86 L. Ed. 2d 1620 (1942):

> Ordinarily it would be uneconomical as well as vexatious for a federal court to proceed in a declaratory judgment suit where another suit is pending in a state court presenting the same issues, not governed by federal law, between the same parties. Gratuitous interference with the orderly and comprehensive disposition of a state court litigation should be avoided.

62 S. Ct. at 1175 (citations omitted).

Similarly, in Will v. Calvert Fire Insurance Co., 437 U.S. 655, 98 S. Ct. 2552, 57 L. Ed. 2d 504 (1978), Justice Rehnquist applied the reasoning of the

Brillhart decision to a case involving concurrent jurisdiction. Recognizing the dangers of duplicative and piecemeal litigation, Justice Rehnquist stated:

> The decision [whether to abstain] in such circumstances is largely committed to the discretion of the district court. Furthermore, Colorado River established that such deference may be equally appropriate even when matters of substantive federal law are involved in the case.

98 S. Ct. at 2558 (citations omitted).

Applying the foregoing to the present case, it is apparent that this factor weighs in favor of dismissal of the federal action. Petitioner's federal action seeks damages based on an alleged violation of § 1983 and prays for declaratory relief. The § 1983 claim is also present in the state court action. Thus, there is no reason for the district court to proceed with the § 1983 claim where "one umbrella is available that will keep everyone out of the rain." City

Fed. Sav. Bank v. Dominion Fed. Sav. & Loan Ass'n, 657 F. Supp. 477, 480 (S.D. Fla. 1987).

Moreover, as the Brillhart court explained, the presence of a declaratory judgment claim in federal court does not require the federal court to retain the action. Litigation of Plaintiff's declaratory judgment in federal court while the primary issues concerning state law are litigated in state court is precisely the type of piecemeal litigation to be avoided.

The fourth factor, the order in which the forums obtained jurisdiction, also weighs heavily in favor of dismissal. Although Petitioner states that "both state and federal Complaints were filed concurrently and the lack of progress in both forums is virtually identical," the record reveals that this is not factually correct. The state and federal Complaints

were filed contemporaneously; however, service was perfected in the state court action on LEWIS on April 10, 1987 (R1-11-2); whereas, service of process was not perfected on LEWIS in the federal action until nine months later. (R1-8). Furthermore, Petitioner's § 1983 claim was perfected in state court by service of Plaintiff's First Amended Complaint on September 14, 1987 which was before service was perfected in the federal action on January 20, 1988. See Heritage Land Co. v. Federal Deposit Ins. Corp., 572 F. Supp. 1265 (W.D. Okla. 1983) (holding that the federal court complaint should properly be dismissed since the state court obtained jurisdiction first by service on the defendant).

In addition, as stated in Cone Memorial, priority should not be measured exclusively by which complaint was filed

first, but rather in terms of how much progress has been made in the two actions. 460 U.S. at 21. There can be no doubt that the state court action has progressed much further than the federal court action. In the state court action, interrogatories and requests to produce were propounded and answered, depositions were set, and motions were noticed and heard or pending while the federal court action has been basically inactive.

Furthermore, as stated in Colorado River, "the apparent absence of any proceedings in the district court, other than the filing of the complaint, prior to the motion to dismiss" weighed heavily in favor of dismissal of the federal action. 424 U.S. at 820. Similarly in this case, the district court, as well as the Eleventh Circuit Court of Appeals, noted Plaintiff's "egregious failure to prosecute this

case." (R1-16-1). Thus, as in Colorado River, there can be no doubt that it would be highly inequitable to LEWIS to duplicate time and effort by keeping this action in federal court.

The fifth factor, whether federal or state law will be applied, again supports the dismissal of this action from federal court. Petitioner's Complaint concerns a violation of Florida's Mental Health Act which is a matter of state law, and can be more adequately decided in a state forum. In addition, prior to the district court's Order of Dismissal, the court dismissed several state court claims, holding that "it would be inappropriate and inefficient to litigate these matters in Federal Court." (R1-13-1). As to the remaining claims for declaratory relief and relief pursuant to § 1983, the state court can adequately address these issues.

The sixth factor, the adequacy of each forum to protect the parties' rights, would appear to be neutral. As discussed above, since the state court is fully capable of deciding a § 1983 claim, it is not required that the federal court hear Plaintiff's declaratory judgment under § 1983. Furthermore, although the federal forum would be able to protect the *rights of the parties, this matter involves a controlling question of state law and thus it would be more appropriate for the action to be tried in state court.

In sum, it is clear after balancing the factors set forth by Cone Memorial and Colorado River that the district court acted within its discretion in dismissing Plaintiff's action. As such, the Eleventh Circuit Court of Appeals decided the present federal question in a way consistent with applicable decisions of this Court. Both

the district court and the Eleventh Circuit Court of Appeals correctly applied the Colorado River/Cone Memorial test and therefore no basis for certiorari review exists.

B. The Eleventh Circuit's Decision is Consistent with Other Federal Decisions.

Consistent with the Supreme Court's rulings, a number of federal courts have found that dismissal of a federal action, in deference to a state court action was proper even where the federal action was based on a violation of § 1983. The Eleventh Circuit's ruling is in accord with these cases.

For example, in Sisler v. West, 570 F. Supp. 1 (S.D. Iowa), aff'd, 718 F.2d 107 (8th Cir. 1983), plaintiff filed a state action asserting only state theories of liability. Eighteen (18) months later, plaintiff filed a § 1983 action in federal court. Both actions contained identical issues of fact. Noting that substantial

discovery had taken place in the state court suit while very little progress had been made in the federal court suit, the court held that the exercise of concurrent jurisdiction would result in piecemeal litigation, waste of judicial resources and inconvenience to the parties. 570 F. Supp. at 3. Just as in Sisler, Plaintiff, for all practical purposes, commenced his federal court action a significant amount of time after the state court action. Furthermore, discovery and prosecution of the state court action which also includes a § 1983 claim, was progressing while the federal court action laid dormant.

Similarly, in Glover v. City of Portland, Tennessee, 675 F. Supp. 398 (M.D. Tenn. 1987), the plaintiff filed an action pursuant to 42 U.S.C. § 1983 against several defendants in state court. She later dismissed one defendant and reinstated her

claim against that defendant in federal court. The defendant in federal court moved to dismiss based on the Supreme Court's decision in Cone Memorial and Colorado River. In response, plaintiff argued that the two lawsuits did not involve the same parties and that the federal forum has an obligation to hear all claims arising under 42 U.S.C. § 1983. The court dismissed after analyzing each of the relevant factors. Focusing on the issue of piecemeal litigation, the court observed that:

> Dividing her section 1983 claims between two courts is a wasteful means of litigating the plaintiff's lawsuit . . . This is just the kind of inefficiency that the Colorado River doctrine was created to address.

Id. at 404-405. The court further rejected plaintiff's contention that the presence of a § 1983 action precludes dismissal since

plaintiff allegedly cannot obtain adequate relief in state court.

In DeVona v. City of Providence, 652 F. Supp. 683 (D.R.I. 1987), the plaintiff filed actions in state and federal court. Each was filed pursuant to 42 U.S.C. § 1983 alleging violations of plaintiff's constitutional rights. The defendants moved to dismiss plaintiff's federal complaint on the grounds "that the federal proceeding was duplicative. . . ." Id. at 685.

The court granted defendant's motion to dismiss after considering the Colorado River and Cone Memorial factors stating:

> This standard does not impose an unflagging obligation on the court to exercise jurisdiction which may be rebutted only by the presence of exceptional circumstances. Rather, the process is one of balancing the Moses H. Cone indicia (along with any other relevant factors) in order to determine whether or not the

> court should exercise its undoubted discretion.

652 F. Supp. at 686. The court also expressed concern about the waste of judicial resources involved in maintaining two suits and the burden on the effective administration of the court's business. The presence of a § 1983 action did not alter the court's conclusion. See also Lumen Constr. Inc. v. Brant Constr. Co., Inc., 780 F.2d 691 (7th Cir. 1985); Gonzalez v. Gonzalez, 536 F.2d 453 (1st Cir. 1976); Roy v. Verchereau, 619 F. Supp. 1323 (D. Vt. 1985). All of the foregoing decisions reveal that the Eleventh Circuit's ruling was proper and consistent with the law. As such, no basis for certiorari review exists.

C. This Case Does Not Present an Important Issue of Unsettled Law.

Defendant, LEWIS, recognizes the importance of the issue before this Court.

However, as the abundant body of law cited above demonstrates, the issue is well settled. Certiorari review would therefore be inappropriate.